

NOT FOR PUBLICATION

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

JOHN T. OLINSKY,

Appellant,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,

Appellee.

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)D.C. Crim. App. No. 2001-0110

)Re: Terr. Ct. Crim. No. F220-2000

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On Appeal from the Territorial Court of the Virgin Islands

Considered: February 27, 2004

Filed: March 26, 2004

BEFORE: **RAYMOND L. FINCH**, Chief Judge, District Court of the Virgin Islands; **THOMAS K. MOORE**, Judge of the District Court of the Virgin Islands; and **PATRICIA D. STEELE**, Judge of the Territorial Court, Sitting by Designation

ATTORNEYS:

Arturo Watlington, Jr., Esq.

St. Thomas, U.S.V.I.

Attorney for Appellant,

Maureen Phelan, Esq.

Assistant Attorney General

St. Thomas, U.S.V.I.

Attorney for Appellee.

MEMORANDUM OPINION

I. SUMMARY

Appellant Olinsky argues that the evidence leading to his conviction was obtained in violation of the Fourth Amendment's prohibition against unreasonable search and seizure. Because the weapon was obtained by the police before the appellant was seized and the Fourth Amendment protections attached, the appellant's arguments are inapposite and his conviction will be upheld.

II. STATEMENT OF THE CASE

On May 27, 2000, just before dawn, a 911 caller alerted police of an man with a cocked firearm behind the screen shop at Vitracco Mall on St. Thomas. The 911 caller appeared to be credible and reliable, and police officers responded. They arrived on the scene to find the door to the screen shop open, while the other shops at Vitracco Mall were still closed. Reasonable suspecting that criminal activity was afoot, the officers searched the adjacent alley.

The officers located appellant at the end of the alley and ordered him to stop and raise his hands. The defendant did not comply, but instead reached into his waist band to retrieve a handgun, and tossed the handgun into the bed of a nearby truck. After he abandoned the gun, he complied with the officer's order to freeze and raise his hands.

The appellant was then arrested and charged with a violation of 14 V.I.C. § 2253(a), possession of a firearm without a license. At trial, the court denied the appellant's motion to suppress and adjudicated him guilty. The appellant was convicted on September 5, 2000, and sentenced on November 20, 2000. He timely appeals.

III. JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction to consider the judgments and orders of the Territorial Court in criminal cases. 4 V.I.C. § 33; Section 23A of the Revised Organic Act of 1954.¹

We review the Territorial Court's denial of the motion to suppress for clear error regarding the facts, and exercise plenary review over legal issues.

IV. DISCUSSION

This case does not fall under *Terry* or *Ubiles*, as the appellant alleges, but rather *California v. Hodari D.*, 499 U.S. 621 (1991). In *Hodari D.*, the Supreme Court held that with respect to a show of authority as with respect to application of

¹ See Revised Organic Act of 1954 § 23A, 48 U.S.C. § 1613a. The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541-1645 (1995 & Supp. 2001), reprinted in V.I. CODE ANN. 73-177, Historical Documents, Organic Acts, and U.S. Constitution (1995 & Supp. 2001) (preceding V.I. CODE ANN. tit. 1).

physical force, a seizure does not occur when the subject has not yielded. In this case, the police told the appellant to stop and raise his hands. The appellant did not comply, but rather reached into his waist band to withdraw the weapon and threw the weapon into the truck. Up to this point, under *Hodari D.*, no seizure had occurred. Then the appellant complied with the police's directive to raise his hands in the air. Only at that point was the seizure complete and the Fourth Amendment protections of *Terry* and *Ubiles* attached.

The trial court was correct that the discovery of the gun was not the fruit of a seizure, but the result of the appellant's voluntary decision to toss away the gun as the officers approached.

V. CONCLUSION

Because the defendant was not "seized" for Fourth Amendment purposes until after he dropped the gun, the trial court correctly denied the motion to suppress. The decision shall not be disturbed by this Court.

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DATED this 26th day of March, 2004.

ATTEST:

WILFREDO F. MORALES
Clerk of the Court

By: _____
Deputy Clerk

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ORDER

Per curiam.

AND NOW, this 26th day of March, 2004, having considered the parties' submissions and arguments, and for the reasons set forth in the Court's accompanying Memorandum Opinion of even date, it is hereby

ORDERED that the decision of the Territorial Court is **AFFIRMED**.

ATTEST:
WILFREDO MORALES
Clerk of the Court

By: _____
Deputy Clerk

Copies to:
Judges of the Appellate Panel
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Honorable Jeffrey L. Resnick
Judges of the Territorial
Court
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